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8 Attorneys for Plaintiffs/Debtors,

9 ALBERT & DEBORAH ALVAREZ

10 **UNITED STATES BANKRUPTCY COURT**

11 **DISTRICT OF NEVADA**

12 In re:

13 ALBERT ALVAREZ and
14 DEBORAH ALVAREZ,

15 Debtors.

CASE NO: BK-S-08-52460-gwz
Voluntary Chapter 7

ADVERSARY PROCEEDING NO.

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18 ALBERT ALVAREZ and
19 DEBORAH ALVAREZ,

20 Plaintiff,

21 v.

22 MORTGAGE ELECTRONIC REGISTRATION
23 SYSTEMS, INC., and AMERICA'S
24 SERVICING COMPANY,

25 Defendants.

Date:
Time:

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1 **COMPLAINT**

2 Plaintiffs, ALBERT ALVAREZ and DEBORAH ALVAREZ, debtors of the above
3 entitled voluntary Chapter 7 bankruptcy, by and through their attorney of record, hereby
4 complains and alleges against defendants Mortgage Electronic Registration Systems, Inc., and
5 AMERICA'S SERVICING COMPANY, as follows:

6 **CORE PROCEEDING**

7 This matter is a core proceeding.

8 **THE PARTIES**

9 1. Plaintiffs, ALBERT ALVAREZ and DEBORAH ALVAREZ, is the debtor in the
10 voluntary Chapter 7 bankruptcy filed herein ("Plaintiff").

11 2. Defendant, Mortgage Electronic Registration Systems, Inc. ("MERS"), is the
12 beneficiary of two deeds of trust recorded in the County of Washoe, Nevada, against the
13 Plaintiff's residence located and commonly described as 592 Penny Way, Sparks, Nevada
14 (hereinafter, the "Property").

15 3. Defendant, America's Servicing Company ("ASC"), is the payee on two
16 promissory notes allegedly secured by the deeds of trusts which MERS is the beneficiary.

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18 **GENERAL ALLEGATIONS**

19 4. On July 19, 2005, two (2) deeds of trusts were recorded in the Recorder's Office
20 for the County of Washoe, State of Nevada listing Mortgage Electronic Systems, Inc.
21 ("MERS") as the beneficiary.

22 5. Plaintiff is listed as the trustor on each deed of trust.

23 6. The trustee listed on each deed of trust is Westwood Associates, Inc.

24 7. Each deed of trust purports to secure a promissory note on the Plaintiffs' Property
25 for the benefit of MERS. MERS has never lent any money to the Plaintiff

26 8. MERS has no right to payment of any kind on any promissory note from the
27 Plaintiff. MERS has never lent Plaintiff any money. Plaintiff has never executed a promissory
28 note in favor of MERS.

1 9. Since the deeds of trust have been recorded, Plaintiff has never made a payment
2 to MERS nor has MERS ever demanded Plaintiff make a payment made to it.

3 10. Plaintiff has never received any notification from MERS or any other entity that
4 MERS was assigned rights under any promissory note.

5 11. The lender listed on each deed of trust is WMC Mortgage Corp.

6 12. America's Servicing Company purports to stand in the shoes of the lender at this
7 time.

8 **CAUSE OF ACTION**
9 **(Extinguishment of Liens)**

10 13. Plaintiff re-alleges and incorporates herein by reference each and every
11 allegation set forth in paragraphs 1 through 11, as if fully alleged herein.

12 14. Nevada law provides that parties may secure performance of an obligation or
13 payment of a debt by utilizing a deed of trust. See NRS 107.020. A deed of trust involves
14 three parties: the trustor, the trustee, and the beneficiary. The trustor is the debtor owning the
15 property that is conveyed to the trustee as security of the obligation owed to the beneficiary.
16 See *Miller & Starr, California Real Estate 3D*, § 10:3 (Three Parties to a Deed of Trust)(2003).
17 The beneficiary of a deed of trust is the person/entity who is the holder of the debt secured by
18 the lien. *Monterey S. Partnership v. W. L. Bangham, Inc.*, 49 Cal.3d 454, 461, 261 Cal.Rptr.
19 587. The payee under a promissory note is the beneficiary under a deed of trust. A deed of
20 trust can only be foreclosed by the owner of the promissory note that is secured by the deed of
21 trust. *Santens v. Los Angeles Finance Co.*, 91 Cal.App.2d 197, 202 (Cal.App.4.Dist.1949).

22 15. A deed of trust must secure some debt or obligation. The lien does not attach
23 prior to the creation of the underlying debt or obligation. The security instrument is merely
24 incident to and measured by the performance of the obligation, there can be no lien of a
25 mortgage or trust deed without an underlying and enforceable debt or obligation. *Alliance*
26 *Mortgage Co. v. Rothwell*, 10 Cal.4th 1226, 1235 (1995). An assignment of the trust deed
27 without a transfer of the obligation (the promissory note) is completely ineffective. *Kelley v*
28

1 *Upshaw*, 39 Cal.2d 179, 192 (1952). See also *Adler v. Newell*, 109 Cal. 42, 46-49 (1885),
 2 holding that an assignment of the mortgage did not carry the debt.

3 16. This has long been the law in throughout the United States: when a note secured
 4 by a mortgage is transferred, “transfer of the note carries with it the security, without any formal
 5 assignment or delivery, or even mention of the latter.” *Carpenter v Longan*, 83 U.S. 271, 275
 6 (1872). Clearly, the objective of this principle is “to keep the obligation and the mortgage in the
 7 same hands unless the parties wish to separate them.” RESTATEMENT (THIRD) OF
 8 PROPERTY (MORTGAGES) § 5.4 (1997). The principle is justified, in turn, by reasoning that
 9 the “the debt is the principal thing and the mortgage an accessory.” *Id.* Given that “the debt is
 10 the principal thing and the mortgage an accessory,” the Supreme Court reasoned that, as a
 11 corollary, “[t]he mortgage can have no separate existence.” *Carpenter*, 83 U.S. at 274. For this
 12 reason, “an assignment of the note carries the mortgage with it, while an assignment of the latter
 13 alone is a nullity.” *Id.* at 274. While the note is “essential,” the mortgage is only “an incident”
 14 to the note. *Id.* “Where the holder of a note has 'transferred' only the deed of trust, the
 15 transaction is a nullity and his 'assignee,' having received no interest in the underlying debt or
 16 obligation, has a worthless piece of paper.” 4 RICHARD R. POWELL, POWELL ON REAL
 17 PROPERTY, § 37.27[2] (2000).

18 17. When the note is split from the deed of trust, “the note becomes, as a practical
 19 matter, unsecured.” RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.4 cmt. a
 20 (1997). A person holding only a note lacks the power to foreclose because it lacks the security,
 21 and a person holding only a deed of trust suffers no default because only the holder of the note
 22 is entitled to payment on it. See RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES)
 23 § 5.4 cmt. e (1997).

24 18. The two (2) deeds of trusts designate MERS as the beneficiary. MERS has no
 25 right to payment from the Plaintiff.

26 19. A “beneficiary” is defined as “one designated to benefit from an appointment,
 27 disposition, or assignment ... or to receive something as a result of a legal arrangement or
 28 instrument.” Blacks Law Dictionary 165 (8th Ed. 2004).

1 20. Because each deed of trust has designated MERS as the beneficiary and because
2 the deeds of trust at issue does not secure any debt enforceable by MERS, each deed of trust is
3 invalid. Each deed of trust has been invalid since their creation.

4 **PRAYER FOR RELIEF**

5 Plaintiff prays for the following relief against defendants, and each of them, as follows:

- 6 a. For an order extinguishing each deed of trust;
7 b. For an award of attorney's fees and costs; and
8 c. For such other and further relief as may be appropriate under the circumstances.
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11 DATED: This 12th day of May, 2010

Tory M. Pankopf, Ltd.

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13 By: /S/ TORY M. PANKOPF
14 TORY M. PANKOPF, ESQ.
15 Attorney for Plaintiffs,
16 ALBERT and DEBORAH ALVAREZ
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